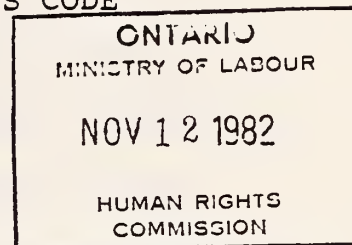


#174

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE

R.S.O. 1980, c. 340



IN THE MATTER OF

Complaints made by Chris Bruton and Helen McInnis of Corunna, Ontario alleging discrimination in employment by M.H.G. International Limited, its servants and agents, and Mr. William Colborne.

BOARD OF INQUIRY

Professor Ian A. Hunter

APPEARANCES

Ms. Bella Fox

Counsel to the complainants
and the Ontario Human Rights
Commission

Mr. J. Frederick Sagel

Counsel to M.H.G. International
and Mr. William Colborne

DECISION

On 8 April 1982 I was appointed as a Board of Inquiry by the Honourable Russell Ramsay, Minister of Labour, to hear and decide complaints filed by Chris Bruton and Helen McInnis alleging discrimination in employment because of sex by M.H.G. International Limited and Mr. William Colborne. Public hearings were held in Sarnia, Ontario on August 23 and 24, 1982. Following the hearing, I received written submissions on the law from both counsel; I would be remiss not to acknowledge my gratitude to Ms. Fox and Mr. Sagel for their assistance both at the hearing and in their written submissions.

THE FACTS

Both complainants are registered nurses, both are residents of Corunna, Ontario and both are on casual staff at the Sarnia General Hospital. As will become evident, the complaints arise from the same incident and raise identical issues; both complaints were heard together.

Helen McInnis has been a registered nurse since 1968. She has had extensive nursing experience in three different hospitals and, since 1969, has been involved in intensive care and cardiac care at the Sarnia General Hospital. She is married and has two children.

Chris Bruton has been a registered nurse since 1971 and has been on the full or part-time staff at Sarnia General Hospital since 1972. She, also, is married and has two children.

In December 1980 the intensive and cardiac care nursing staff at Sarnia General Hospital elected to change from eight to twelve hour shifts. This change affected both complainants since neither wished to be absent from their children for that length of shift. Accordingly, both Bruton and McInnis elected to go on "casual" staff which meant that they would be called in by the hospital for work as and when circumstances required. Since this arrangement offered no secure minimum work and income, both women decided to seek alternative additional full or part-time employment in the industrial nursing field.

Chris Bruton had previous experience in industrial nursing, having worked as a relief industrial nurse at Union Carbide and Petrosar. Union Carbide employs industrial nurses through Best personnel agency and so Mrs. Bruton's name was already on file at Best personnel. Mrs. McInnis had no industrial nursing experience.

In December 1980 Mrs. Bruton received a telephone call from Gerry McCartney, manager of Best personnel, inquiring whether or not she was interested in a two to three month position in construction nursing. Initially Mrs. Bruton declined because she considered she would have to relinquish

her casual employment at Sarnia General Hospital to work full-time for two to three months. However, she called her friend, Heidi McInnis, and asked if she was interested in the job. During this conversation the two women hit upon the idea of sharing the job between themselves and it was agreed that Mrs. Bruton would make this proposal to Mr. McCartney. Mrs. Bruton called Mr. McCartney at Best personnel and put this proposal; Mr. McCartney indicated that he would have to discuss it with his client M.H.G. International Limited, and would let them know.

On December 24, 1980 both women were called in for an interview at Best personnel. Initially they were interviewed by a secretary who told them that they would be replacing the regular nurse (one Gerry Dumouchel) who required major heart surgery and would be off the job for two to three months to recuperate. They were also told that if Mr. Dumouchel could not return to work after his surgery, they would be considered for full-time employment with M.H.G.

Immediately after this interview, both complainants were interviewed by Mr. Gerry McCartney. He told them much the same thing and estimated the duration of the job at M.H.G. at two to three months. There was some discussion of remuneration. M.H.G. was offering approximately eight dollars per hour and both complainants indicated that they would require nine dollars and fifty cents per hour. Mr. McCartney undertook to contact the company and get back to them.



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On January 7, 1981 Mr. McCartney called Mrs. Bruton and indicated that M.H.G. was agreeable to the "job sharing" arrangement and that they would both be paid nine dollars and fifty cents per hour. There is some uncertainty in the evidence as to whether or not Mr. McCartney told Mrs. Bruton that they would be employed by Best personnel as the nominal employer; in any event, that was the arrangement and its significance, if any, will be considered later. M.H.G. gave the complainants a free hand to divide the forty hour work week among themselves and their plan, at least at the beginning, was for each woman to work alternate days. Mrs. Bruton inquired about a dress code and was told that a white pantsuit would be the most suitable work attire. They were to commence employment on January 12, 1981.

Chris Bruton then telephoned Helen McInnis and told her that they had the job.

At 7:30 a.m. on January 12, 1981 Mrs. McInnis attended at the M.H.G. job site. At this stage the site consisted of some administrative trailers, a first aid trailer located on an old parking lot approximately 200 yards from the administration trailers and approximately one-quarter mile from the actual job site where the Beutal rubber plant was being built by M.H.G. for Polysar. Mrs. McInnis first met Roger Belair, the field office manager, and then Les Dudley who was M.H.G.'s first aid and safety supervisor. Mr. Dudley escorted her to the first aid trailer and several times apologized for its somewhat

primitive conditions (unheated, no toilets, minimal supplies).

Mr. Dudley emphasized to Mrs. McInnis the importance of having only minimal contact with the workmen on the site. This meant getting them in and out of the first aid trailer as quickly as possible, no fraternization or socializing, and taking her coffee and lunch breaks at times other than those when the men would be in the cafeteria. This was necessary, he explained, since otherwise the men would "hang around" the first aid trailer and productivity on the job would suffer.

The actual first workday proceeded uneventfully. First aid records introduced as exhibits by the respondent establish that Mrs. McInnis treated five men for minor ailments and complaints ranging from a swollen knuckle to shortage of breath.

In the afternoon of January 12, 1981 Les Dudley and a Ministry of Labour employee named Richardson came to the first aid trailer. In the course of some conversation about safety, the Ministry employee allegedly said to Mrs. Bruton (in Mr. Dudley's presence): "You're too pretty to be working in a trailer. The men will be in the trailer not out on the job site." Richardson, the Ministry of Labour employee was not a witness at the hearing. In reaching my decision, I take no account of this evidence for two reasons: (1) It was hearsay; although the Statutory Powers Procedure Act allows me to

receive hearsay evidence, in my opinion it should be given less weight because it is not subject to cross-examination.

(2) In any event, even if this remark was made it reflected on Mr. Richardson's attitude but not, in any way, on M.H.G.'s attitude. Consequently, it is not probative of the issue of whether or not M.H.G. discriminated.

At the end of the day Mrs. McInnis had enjoyed her first exposure to construction nursing and she was pleased to be complimented on her performance by Les Dudley. This was to be Mrs. McInnis's last direct contact with anyone from M.H.G.

Mrs. Bruton worked the next day, January 13, 1981. She, too, was introduced to Mr. Belair and to Mr. Dudley and she also had an uneventful work day. She saw only three employees, although one employee returned on several occasions. Mr. Dudley instructed her not to encourage the men on the job site in any way; this meant specifically not to talk to them while walking between the nursing and administration trailers; to move them out of the first aid trailer and back onto the job site as quickly as possible; and to take her coffee and lunch breaks at times other than those when the workmen would be in the cafeteria. She testified that she complied with all of these instructions as best she could. However, while she was at lunch in the cafeteria, she saw Stuart Jeffrey who was a construction supervisor at M.H.G. and an acquaintance of Mrs. Bruton's husband. In the course of idle conversation, Mrs. Bruton testified that Stuart Jeffrey said: "I hear

first aid incidents have gone up by 500 per cent."

Mr. Jeffrey testified that he recalled speaking to Mrs. Bruton that day but could not recall what was said.

At the end of her shift, Mrs. Bruton was pleased to be complimented by Mr. Les Dudley on her performance. Although it had been a quiet day, Mr. Dudley indicated satisfaction since infrequent first aid calls meant that things were going smoothly on the job site.

The following day (January 14, 1981) Mrs. Bruton also worked uneventfully in the morning. In the afternoon, Les Dudley told her to call Gerry McCartney at Best personnel and somewhat enigmatically warned her that it might be "bad news." Mrs. Bruton went over to the administration trailer since there was no phone in the first aid trailer. She was told she could use the phone in the main office area which, because it was within hearing of everyone in that area, afforded little privacy. She placed a call to Mr. McCartney who told her simply that her job at M.H.G. was finished because M.H.G. had hired a full-time male nurse. No explanation for this was offered.

Mrs. Bruton described her reaction as shocked. She sat by the telephone for a few moments "to absorb it and got madder the longer I sat there and decided that I would speak to Mr. Belair." (transcript page 45). She went into Roger Belair's office and sat down and asked him if it was

true that a man had been hired to replace them. Mr. Belair replied: "Yes." Mrs. Bruton asked if there had been anything wrong with her job performance. Mr. Belair said: "No." Mr. Belair emphasized that they had been hired through a temporary employment agency. His final comment to her was that "Mr. Colborne found somebody he preferred for the job."

By now Mrs. Bruton was very upset, and close to tears. She returned briefly to the first aid trailer and then went back to the reception area and sat there until the workday was finished. When she returned home and told her husband that evening, he called his acquaintance, Stuart Jeffrey, to see what had happened. Mr. Jeffrey allegedly told him that at a company first aid meeting Mr. Colborne had said that pretty nurses would be disruptive, and that he wanted the two women replaced; he didn't care by whom. Mr. Jeffrey, who is still employed by M.H.G., testified and confirmed that a telephone conversation with Mr. Bruton occurred that night, that he recalled that the subject matter of the call was the termination of Mrs. Bruton's employment, but that he could not recall what he had told Mr. Bruton. I was not impressed by Mr. Jeffrey's evidence nor with his selective difficulty in recall.

Both complainants were present when this telephone call was made. Each testified that she was upset, embarrassed and angry.

Specifically, Mrs. Bruton testified: "...I was very upset...I was close to tears...very angry...furious...I couldn't understand how they could do that...I was too upset to talk about it...and I felt like I was stepped on, like I tried it for a day and a half and I was furious that they could, as far as I could tell the only reason I'd been replaced was 'cause I was a female and younger than they thought maybe. I was in tears everytime I talked about it for two weeks later...I was embarrassed..." (transcript pp. 45-49).

Mrs. McInnis testified: "...I really was miffed...I was miffed and I just couldn't understand it. It was a job that I'd been looking forward to...I was upset Wednesday and couldn't understand why the job was gone. I thought that I had performed well and I had very favourable performance reviews at work, and I was hurt and insulted. Professionally I wondered what people would think of me when I just had the job for one day. I've had to change babysitters because usually I worked afternoon shift and this was daytime employment and the sitter I had couldn't accommodate so I had to change sitters which created a little bit of a problem. ...I was very much upset and upset for a week..." (transcript pp. 14-15).

To this point, none of the facts I have recounted was challenged by company evidence. Neither Mr. Dudley nor Mr. Belair testified. The respondent called only two

witnesses, one of whom (Patricia White) worked as a construction nurse for M.H.G. but did not commence employment until some ten months after the incidents involving the complainants had occurred; therefore, she could shed no light on what happened or why.

The other company witness, William Colborne, was the resident construction manager for M.H.G. at the relevant time. He testified that he was responsible for everything that took place on the construction site, including first aid and safety and all hiring and termination decisions.

Mr. Colborne was a candid witness.

He testified that when work began on the construction site (August 4, 1980) he arranged for a first aid and safety trailer to be brought to the site and he hired Les Dudley specifically to supervise this area. Through Best personnel he hired Gerry Dumouchel, a male nurse, in the late fall of 1980. Mr. Colborne testified that he chose to hire a male rather than a female because the first aid trailer was located approximately 200 yards away from the administration trailer and it was still dark at 7:30 in the morning when the work shift began. In examination-in-chief, Mr. Colborne stated: "I elected at that time for safety reasons to hire a male instead of a female nurse and so instructed my office manager who is also personnel manager because of the remote location..." and I didn't think it was proper to have a woman walking on the

site in the dark..."and "I didn't want the worry of having a woman on the site..." (transcript pp. 151-152).

When Mr. Dumouchel developed heart problems necessitating major surgery, Mr. Colborne had Mr. Belair contact Best personnel to arrange for a replacement.

As has already been explained, Mr. McCartney of Best personnel discussed this temporary full-time position with Chris Bruton and shortly thereafter put to M.H.G. the proposal that Bruton and McInnis divide the nursing duties between them. Mr. Colborne testified that Mr. Belair told him that Best personnel couldn't find a male nurse so he had no choice but to take the two women.

Mr. Colborne testified that on January 14, 1981 Les Dudley came to him and pointed out the legal safety requirements for a job site similar to M.H.G. did not necessarily require a registered nurse; M.H.G. could get by with a lesser qualified person (i.e. a paramedic or someone trained in first aid). Mr. Colborne testified that he then told Mr. Dudley to terminate the employment of the two female nurses, the complainants, and get someone else: "It relieved me of the concern I had, safety standpoint for the woman and very likely at a lesser cost so I instructed Belair to terminate the women and replace them with a lesser person and he did." (transcript p. 153).

The two complainants were replaced by a male paramedic named Kenneth Vingoe. Despite Mr. Colborne's suggestion

that cost saving may have been a factor in his decision to terminate the two female nurses, the evidence clearly established that it cost M.H.G. substantially more for Mr. Vingoe's lesser qualified services (specifically \$14.50 per hour) than it did for the two complainants' registered nursing services (\$9.50 per hour). Both David Taylor, the owner of First Aid and Safety Services (the company which "found" Mr. Vingoe for M.H.G.) and his assistant, Eric Wright, testified that Mr. Belair stated to them that the company required a male nurse. The company's reason, according to David Taylor's evidence, was that the height of the structures and the strength requirements would require a man; also that M.H.G. knew from past experience that if there were female nurses in the first aid trailer the workmen would make more trips than necessary. It should be emphasized that there was no evidence whatsoever led before the Board which would substantiate either of these alleged concerns.

Mr. Colborne did not deny that he made the decision to terminate the employment of Chris Bruton and Heidi McInnis at M.H.G. at least partly because of their sex. Indeed, he confirmed that this was the primary reason, although as well he expected to save money by replacing them with a lesser qualified male paramedic. In fact, as pointed out above, he replaced them with a lesser qualified but more costly male paramedic. Having reviewed Mr. Colborne's evidence in detail, there cannot be any doubt that the primary consideration in

the decision to terminate the complainants was that they were female and Mr. Colborne wanted a male. Mr. Colborne did not approve of female nurses on the job site.

Not a scintilla of evidence was called to suggest that sex was a bona fide occupational qualification or a requirement for this construction nursing position (cf. section 4(6)). Indeed, the company subsequently hired a woman, Patricia White, to fill this position and her performance was entirely satisfactory; similarly, there was no evidence that the performance of Chris Bruton and Helen McInnis was anything other than satisfactory.

The only explanation which Mr. Colborne could give for hiring Patricia White after he had fired the two female complainants was that the first aid trailer had now been equipped with a telephone and that it was located in somewhat closer proximity to the administration trailer.

The respondent put considerable emphasis on the fact that the two complainants were nominally employees of Best personnel and that their salaries were paid by Best. Several points should be noted:

(1) Gerry McCartney's evidence was unequivocal that the hiring and firing decisions were made by M.H.G. and not by Best personnel. Indeed, this is self-evident from the sequence of events (i.e. Mr. McCartney telling the complainants that he would put their proposal of job sharing to the client, M.H.G.,

for approval; also checking with M.H.G. as to whether the company would pay their requested rate of remuneration-- nine dollars and fifty cents minimum per hour). In his evidence, Mr. McCartney stated: "We had no control over who was hired."

(2) Mr. Colborne's evidence makes it crystal clear that the hiring and firing decisions were his exclusively. In cross-examination the question was put: "Mr. Colborne, my question was, did you in fact dismiss the persons that were working on the job site in January 1981 who were female in the work trailer, in the first aid trailer"?

Answer: "I did. Yes ma'am." (transcript p. 157).

(3) Whether one uses the indicia of employment traditionally associated with Lord Wright's decision in Montreal v. Montreal Locomotive Works (1947), 1 D.L.R. 161, or the more modern "organization" test enunciated by MacKinnon J.A. in Mayer v. J. Conrad Levigne (1980), 27 O.R. (2d) 29, it is clear that the two complainants were employees of M.H.G. International Limited.

(4) Finally, even if one ignores all the evidence to the effect that Best personnel were employers in name only and that the real employer was M.H.G., section 4(1) of the Code states that: "No person shall...

(b) dismiss...any person...because of...sex."

Where the Legislature intended to restrict the application of the Code to an "employer" (e.g. section 4(2)) or an "employment agency" (section 4(5)) it has done so expressly. By contrast, section 4 speaks of "no person" rather than "no employer" and M.H.G. International Limited was unquestionably a "person" within the definition of that word in section 26(i) of the Code.

In both complaints William Colborne was a named respondent as well as M.H.G. Although the evidence on this point was sparse to say the least, I am satisfied that in making his decision to terminate the employment of the two female nurses Mr. Colborne was acting within the course and scope of his employment as resident construction manager of M.H.G. International Limited and, accordingly, that my order should be against the corporate respondent and not against Mr. Colborne personally.

On all of the evidence, I find that M.H.G. International Limited discriminated against Chris Bruton and Helen McInnis by terminating their employment because of their sex.

R E M E D Y

When a Board of Inquiry has found a contravention of the Human Rights Code, its remedial authority (section 19(b)) is to "...order any party who has contravened this Act to do any

act or thing that, in the opinion of the Board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefore."

The purpose of an order, as I conceive it, should be to restore the complainants, so far as that is possible, to the position they would have been in but for the illegal and discriminatory act.

In the instant case, counsel for the Commission and the complainants requested a tripartite order: (a) special damages, representing eleven weeks lost wages; (b) general damages in the amount of \$3000 for each complainant; and (c) posting of the Ontario Human Rights Code card in the respondents' offices.

(a) Special Damages

As a result of the respondents' discriminatory and illegal act, the complainants lost the earnings they would otherwise have received for construction nursing at M.H.G.

Helen McInnis testified that the complainants were told by Best personnel that the job was "for two to three months" with a possibility of continuing full-time employment.

Chris Bruton testified that the complainants were told that the job was for "two or three months," but that "it might turn into a full-time position."

Gerry McCartney from Best personnel, who had actually been in contact with M.H.G. and was in the best position to know, testified that he told the complainants that the job "...could go for three months or beyond depending on the condition or the health of Mr. Dumouchel" (transcript p. 97).

Accordingly, I accept the Commission's submission that, in all probability, the complainants would have had eleven weeks employment but for the discriminatory act; accordingly, I order compensation by way of special damages for lost wages for eleven weeks. The complainants were paid nine dollars and fifty cents an hour and would have worked forty hour weeks. Accordingly, my calculation is as follows: $\$9.50 \times 40 \text{ hours} \times 11 \text{ weeks} = \$4,180$. Since the complainants intended to divide the work equally, M.H.G. is hereby ordered to pay each complainant the sum of \$2,090 as lost wages.

(b) General Damages

I have set out (supra) the reaction of each complainant to being fired. Clearly both complainants were upset, embarrassed and inconvenienced. To both it was particularly galling to be fired since their competence was never questioned. In a letter dated January 19, 1981 to Best personnel, Mr. Belair confirmed that both complainants were "competent." Nevertheless, each complainant understandably regarded the termination as a slur on her professionalism; as such, it was difficult

and embarrassing to explain to professional colleagues. These factors suggest that a substantial monetary award, by way of general damages, would be appropriate.

However, there are also mitigating factors. Both complainants understood from the beginning that this was temporary, not permanent, employment. Also, the dismissal occurred before either had built up much reliance interest in this job. Indeed, Helen McInnis worked but one full day; Chris Bruton only two. Also, the economic expectations that the complainants justifiably had will be met by the order I have made for payment of special damages by way of lost wages. Also, I must consider that any remaining slur on their professional competence should be dispelled by this decision.

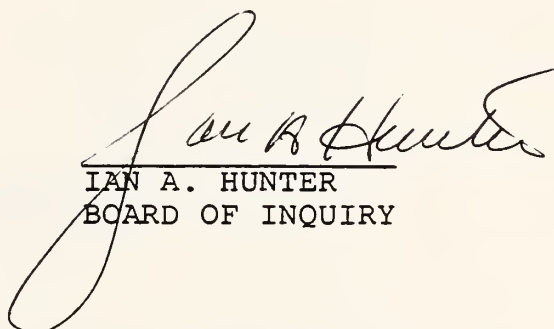
After conscientiously weighing these considerations, and allowing for the inexact nature of such calculations, I have concluded that \$1000 would be an appropriate figure for general damages to be awarded to each complainant.

(c) Posting of Code Cards

The posting of Human Rights Code cards may serve as a reminder both to employers of their statutory obligation and to employees of their rights under Ontario's human rights law.

Accordingly, I shall make an order requiring the company to post Human Rights Code cards in appropriate locations.

DATED at the City of London in the County of Middlesex
this 8th day of November, 1982.



IAN A. HUNTER
BOARD OF INQUIRY

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE

R.S.O. 1980, c. 340

AND IN THE MATTER OF complaints made by Mrs. Chris Burton and Mrs. Helen McInnis of Corruna, Ontario alleging discrimination in employment by M.H.G. International Limited and Mr. William Colborne.

O R D E R

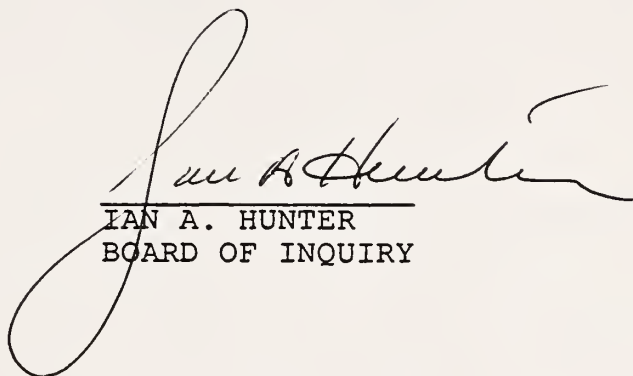
This matter coming on for hearing on the 23rd and 24th day of August, 1982, before this Board of Inquiry, pursuant to the appointment of Russell Ramsay, Minister of Labour, dated April 8, 1982, in the presence of counsel for the Commission and the complainants, and counsel for the respondent, upon hearing evidence adduced by the parties and what was alleged by the parties, and upon finding that the complaints are substantiated by the evidence:

IT IS HEREBY ORDERED THAT:

(1) The respondent M.H.G. International Limited pay to each complainant the sum of three thousand and ninety dollars (\$3,090) as compensation for lost wages and injury to dignity, reputation and feelings as a result of the discriminatory act; and

(2) that the respondent post not fewer than two copies of Ontario Human Rights Code cards, to be supplied to the respondent by the Ontario Human Rights Commission, at conspicuous locations at each and all of its business and construction sites located in the Province of Ontario.

DATED at the City of London in the County of Middlesex
this 8th day of November, 1982.



IAN A. HUNTER
BOARD OF INQUIRY

